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No. 71-1484

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

Edward R. Fink and Joan O. Fink
Petitioners

v.

United States
Respondents

On Petition for a Writ of Certiorari to the

United States Court of Claims

REPLY BRIEF

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ARGUMENT IN REPLY

This is in reply to the Brief for the United States in Opposition, which has been submitted by the Solicitor General.

First, the government cites Poe v. Seaborn (282 U.S. 101; government brief p. 4) for the proposition that the husband in a community property situation earns his salary as an agent.

It is important to note that the portion of the sentence concerning agency (government brief, p. 4 preceding the citation) originates not with the Supreme Court, but with the Solicitor General. The Supreme Court uttered the other portion of this sentence which is within the quotation marks to distinguish Mr. Seaborn's situation from that of Mr. Earl's (Lucas v. Earl, 281 U.S. 111), where Mr. Earl, in a sort of do-it-yourself community-property arrangement, assigned to his wife one-half of his earnings. Mr. Earl was taxed on all of his income because he had to own it before he could assign it. Under community-property law, to the contrary, as soon as income is acquired it is jointly owned then and there. The ruling in Poe v. Seaborn, supra, and the ruling in United States v. Mitchell, 403 U.S. 190, stand for instantaneous vesting of a property right and not for agency.

If Poe v. Seaborn, supra, is to be considered to be controlling, it must be noted that when the then Solicitor General argued to justify taxation of the wife's share upon the husband's managerial powers (Poe v. Seaborn, supra, at 103), Mr. Seaborn made the same argument as is made here, and in stronger terms (Poe v. Seaborn, supra, at 107); i.e., control of community property is not income and, hence, taxation of it is unconstitutional unless it is apportioned. The argument was apparently so strong that the Supreme Court never considered taxation based upon control alone (Poe v. Seaborn, supra, at 111, 112).

The Solicitor General suggests that community property is nothing more than a simple agency situation. The history of community property is recorded in scholarly fashion in Hammonds

y. Commissioner of Internal Revenue (106 F.2d 420). Community-property statutes are historically real, not personal. They operate on things, and not people. All that happened here was that half of Edward's salary-dollars belonged to Joan. Agency presupposes some contractual arrangement between master and servant. In this case, the marriage contract and the operation of state law are the immediate source of the income to the wife, and not the husband's employer.

A WIFE'S PROPERTY RIGHT TO ONE-HALF OF A DOLLAR BILL EARNED BY HER HUSBAND DOES NOT CREATE AN INCOME SITUATION, IN THE LEGAL OR DICTIONARY SENSE OF THE WORD INCOME, BETWEEN HER AND HER HUSBAND'S EMPLOYER. The Sixteenth Amendment, therefore, does not apply to respondent's theory of this case. A tax on the community property of the wife would be unconstitutional but for the fact that it is considered to be income from the marriage contract, or marriage partnership.

Last of all, the government brief claims that it would frustrate a congressional intent to give a tax benefit to a person from a community-property state (government brief p. 4). Yet, the brief recognizes that a serviceman from a community-property state gets a tax benefit if his wife is alien (government brief p. 5). Accordingly, the fact wage earners working side by side on the same ship may not be treated equally is recognized, but the distinction between foreign and citizen wives rather than community property and non-community property is used as the basis for discrimination. The Supreme Court has stated, in Poe v. Seaborn (supra, at p. 117),

> [a]nd differences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity.

Indeed, congressional intent, measured by the fact foreign wives are not allowed to submit joint returns, is to discriminate against foreign wives rather than to favor them. Accordingly, it would appear that both congressional intent and constitutional interpretation favor the disposition urged by petitioners.

Respectfully submitted,

Edward R. Fink

EDWARD R. FINK

Joan O. Fink

JOAN O. FINK

CERTIFICATION

We certify that on this 28th day of July 1972, we mailed three copies of this brief to the Solicitor General, Department of Justice, Washington, D. C. 20530.

Edward R. Fink

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Joan O. Fink

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